LEONG AH WENG

v.

NEOH THEAN SOO & ANOR.

FEDERAL COURT, PENANG
RAJA AZLAN SHAH LP
MOHD. AZMI FJ
EUSOFFE ABDOOLCADER FJ
[CIVIL APPEAL NO. 167 OF 1982]
7 MAY 1983

CIVIL PROCEDURE: *Consent order - Respondents' action against appellant was for possession of some land leased out to appellant - Claim for damages and mesne profits - Settlement reported and obtained consent order - Lease to expire on specified date - Whether respondent can apply for leave to issue writ of possession against appellant on the basis of consent order - No order for giving of possession on expiry of lease in consent order - Effect of.*

The respondents instituted an action against the appellant for possession of some land leased out to him consequential claims for damages and mesne profits. The appellant joined issue on the claim but at the hearing of the action, the parties reported a settlement and obtained a consent order on 20 March 1978 to the effect that on the payment by the appellant to the respondents of a sum of RM8,900 within a specified period the respondents would grant a lease of the land in question to the appellant in terms of an agreed draft lease attached to the order commencing from 16 March 1978 and expiring on 15 September 1981, and it was further ordered that in the event of the appellant defaulting in complying with the order he was to deliver vacant possession of the land forthwith to the respondents.

The requisite payment under the order was duly made and a lease in terms of the draft entered into but the appellant had failed to give possession of the land on the specified date of its expiry, being 15 September 1981 and that the appellant had agreed and accepted that the respondents would not grant any further term after the expiry thereof. The respondents then applied for leave to issue a writ of possession against the appellant on the basis of the consent order of 20 March 1978 and the learned Judicial Commissioner of the High Court accordingly granted leave on 25 November 1981 in chambers and a writ of possession was in consequence issued on 26 November 1981. The matter of leave to issue the writ of possession went for further argument in open Court on 10 May 1982 and in a reserved judgment delivered on 11 June 1982 the learned Judicial Commissioner affirmed his decision granting leave to issue the writ. The appeal was against this order.

Held:

[1] Order 45 r. 3(1)(a) of the Rules of the High Court 1980 prescribes that a judgment or order for the giving of possession of immovable property may be enforced by a writ of possession. There was no such order for possession in the consent order in respect of the lease entered into as a result of the compromise between the parties. The consent order as it stands would appear to have determined the proceedings instituted by the respondents with a resultant spent cause of action.

[2] The respondents' solicitors could have taken steps to protect their clients' interests by providing for this eventuality in the consent order but did not do so nor even seek an express provision in the order for liberty to apply. That aside, all orders of Court carry with them *in gremio* liberty to apply to the Court as this is implied without its being expressly reserved.

[3] The respondents could have applied to Court for an appropriate consequential order in the event that happened but had failed to do so and without any order for possession sought leave to issue a writ of possession in flagrant disregard of the specific provisions of the rule of Court referred to.

[4] There was no order for the giving of possession on the expiry of the lease which is a prerequisite for its enforcement by a writ of possession as required by the rules of Court and the learned Judicial Commissioner therefore could not and should not have given leave to issue a writ of possession in this case.

[5] The appeal was accordingly allowed with costs of the Federal Court and the High Court, the writ of possession and the leave granted for its issue were set aside and the deposit lodged in Court by way of security was ordered to be paid out to the appellant to account of his costs.

[Appeal allowed with costs.]

Cases referred to:
Fritz v. Hobson [1880] 14 Ch D 542
Societe des Etains de Bayas Tudjuh v. Woh Heng Mining Kongsi [1978] 2 MLJ 267
Sungei Biak Tin Mines Ltd. v. Saw Choo Teng & Anor. (No.2) [1970] 2 MLJ 226
E.F. Phillips & Sons Ltd. v. Clarke [1970] Ch 322

Legislation referred to:
Rules of the High Court 1980, O. 45 r. 3(1)(a)

Other sources referred to:
Practice Note [1927] WN 290

For the appellant - W.S.W. Davidson; M/s. Azman, Davidson & Co.
For the respondents - Lim Kean Chye (T. Rajamoorthy with him) M/s. Jayadeva & Kamal.

JUDGMENT

Eusoffe Abdoolcader FJ:

A consent order can at times veritably be a *pons asinorum* and this appeal illustrates the pitfalls in any temerarious resort to the enforcement of a compromise of an action by a consent order without thought to its form, substance or entailment.

The facts of the matter, briefly stated, are that the respondents instituted an action against the appellant for possession of some land leased out to him with consequential claims for damages and mesne profits. The appellant joined issue on the claim but at the hearing of the action the parties reported a settlement and sought and obtained a consent order on 20 March 1978 to the effect that on the payment by the appellant to the respondents of a sum of RM8,900 within a specified period the respondents would grant a lease of the land in question to the appellant in terms of an agreed draft lease attached to the order commencing from 16 March 1978 and expiring on 15 September 1981, and it was further ordered that in

the event of the appellant defaulting in complying with the order he was to deliver vacant possession of the land forthwith to the respondents. The lease itself specifically provided that it would expire on 15 September 1981 and that the appellant agreed and accepted that the respondents would not grant any further term after the expiry thereof.

The requisite payment under the order was duly made and a lease in terms of the draft entered into but the appellant failed to give possession of the land on the specified date of its expiry. The respondents then applied for leave to issue a writ of possession against the appellant on the basis of the consent order of 20 March 1978. Leave was accordingly granted by the learned Judicial Commissioner on 25 November 1981 in chambers and a writ of possession was in consequence issued on 26 November 1981. Apparently from the record of the proceedings the matter of leave to issue the writ of possession went for further argument in open Court on 10 May 1982 and in a reserved judgment delivered on 11 June 1982 the learned Judicial Commissioner affirmed his decision granting leave to issue the writ. The appeal before us is against this order.

Order 45 r. 3(1)(a) of the Rules of the High Court 1980 prescribes that a judgment or order for the giving of possession of immovable property may be enforced by a writ of possession. There was no such order for possession in the consent order of 20 March 1978 in respect of the lease entered into as a result of the compromise between the parties. The consent order as it stands would appear to have determined the proceedings instituted by the respondents with a resultant spent cause of action. The respondents' solicitors could have taken steps to protect their clients' interests by providing for this eventuality in the consent order but did not do so nor even seek an express provision in the order for liberty to apply. That aside, all orders of Court carry with them *in gremio* liberty to apply to the Court [*Fritz v. Hobson* [1880] 14 Ch D 542 (at p. 561 per Fry J)] as this is implied without its being expressly reserved [*Societe des Etains de Bayas Tudjuh v. Woh Heng Mining Kongsi* [1978] 2 MLJ 267 (at p. 270); *Sungei Biak Tin Mines Ltd. v. Saw Choo Teng & Anor.* (No. 2) [1970] 2 MLJ 226 (at p. 227)]. The respondents could have applied to Court for an appropriate consequential order in the event that happened but failed to do so and without any order for possession sought leave to issue a writ of possession in flagrant disregard of the specific provisions of the rule of Court we have referred to. Short of applying to Court for an order for possession under the implied provision for liberty to apply it would appear that a fresh action would have been necessary to enforce the respondents' right to possession of the land in question.

We should perhaps touch on the rarity of recourse in our Courts in compromises of actions to a Tomlin order which is one in the form directed by Tomlin J, where an action is stayed by consent upon terms agreed between the parties and scheduled to the order with liberty to apply as to carrying such terms into effect [*Practice Note* [1927] WN 290]. In a Tomlin order liberty to apply is expressly stipulated and on an application strictly to enforce the terms embodied in the Tomlin order and the schedule thereto in the normally appropriate form with a qualified stay and liberty to apply, an order to give effect to those terms may be obtained under the liberty to apply in the original action, notwithstanding that they go beyond the ambit of the original dispute and could not have been enforced in the original action and even if the obligation did not then exist but arose for the first time under the compromise. [*E.F. Phillips & Sons Ltd. v. Clarke* [1970] Ch 322]. We stress the necessity to apply to Court under the liberty to apply and the principle enunciated would appear to squarely cover the event that transpired in the instant appeal.

In the matter before us the terms of compromise between the parties embodied as a rule of Court in the consent order of 20 March 1978 had been complied with and implemented. The term of the draft lease specified in the consent order and in the draft lease itself would make no difference to any requirement for an order for possession after the expiry of the lease in relation to enforcing the respondents' rights under the consent order without more ado. There was no order for the giving of possession on the expiry of the lease which is a prerequisite for its enforcement by a writ of possession as required by the rules of Court and the learned Judicial Commissioner therefore could not and should not have given leave to issue a writ of possession in this case.

We accordingly at the conclusion of argument allowed this appeal with costs here andbelow, set aside the writ of possession and the leave granted for its issue and ordered the deposit lodged in Court by way of security to be paid out to the appellant to account of his costs.

Also found at [1983] 2 CLJ 5